IN THE

# Supreme Court of the United States.

**OCTOBER TERM, A. D. 1897.**

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*No. 147 (16,137).*

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THE DEL MONTE MINING AND MILLING COMPANY, APPELLANT,

*vs.*

THE LAST CHANCE MINING AND MILLING COMPANY, APPELLEE.

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CERTIFIED FROM UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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## REPLY BRIEF OF APPELLANT.

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The elaborate discussion by appellee's counsel of the two most important questions certified to this Court, and their novel claim of extra-lateral rights to the Last Chance vein, so called, imposes upon us the necessity of a formal reply. In framing our original argument we had before us, of course, the brief filed by appellee in the court of appeals. To some extent we could therefore anticipate and try to meet

the claims of counsel. Their supplemental brief, however, prepared after ours was delivered, taken in connection with its predecessor, suggests some matters of importance not fully covered by our brief, and for whose consideration we beg the indulgence of the Court.

It will be observed, we think, that the appellee's most earnest and anxious contention involves its right to locate its south end line across and upon the previously appropriated New York territory. It plaintively assures the Court that with the New York it has no controversy; that the latter is quiescent and sympathetic, and that the appellant has therefore no reason for complaint. Conscious, however, that this circumstance is wholly unimportant, and that some definite claim of right or of ownership must be asserted in order to justify the intrusion, it puts forward one of the most remarkable propositions ever advanced, even under the mining act of 1872. It is in substance that by relocating a part of the apex of the already located New York vein, it may acquire title to such part of that vein which lies below the point of divergence of the extended New York end lines from its own. This proposition is asserted with a plausibility and argued with an adroitness that are far more commendable than convincing.

If we correctly understood appellee's original position, it was that the Last Chance south end line was of necessity placed upon New York territory in order to secure that parallelism which must exist to confer extra-lateral rights to that part of the vein which was locatable. If we correctly understand Judge Hallett's decision, it is founded upon that condition. Much more than this is now claimed; and if anything were needed to emphasize the unsoundness of appellee's contention, that thing has been thus supplied by its counsel; for it may be safely asserted that they are too wise, too experienced, and too practical to deliberately advance such an extravagant claim, did not the nature of their client's case imperatively require it.

We have commented heretofore upon counsel's endeavor to establish some distinction between "patented surface" and "lines of location," and upon the extracts from the statute which are quoted to sustain their contention. We have nevertheless to notice specifically two or three statements appearing in the brief in connection therewith. After assuming to their own satisfaction that boundaries of the claim can be laid anywhere, counsel assure us that parallel end lines thus laid upon the ground by the locator "are necessarily and of course subject to any superior rights, either on the surface or underground, possessed by another" (p. 10, first brief).

It is also said that "*as a result of the requirement that locations shall have parallel end lines* and because the validity of conflicting locations is a question of uncertainty, mining claims do overlap each other in all conceivable directions" (p. 10, first brief).

The first sentence above quoted involves an admission of our claim, since the "superior rights" referred to are the full equivalent of the entire conflict, both as to surface and as to lodes—that is, they are "exclusive" and made so by law. The statement that the statutory requirement of parallelism of end lines is the cause of conflicting locations, is wholly untenable. In the first place, conflicts for that purpose are never necessary. Again, if they were, the overlaps could not and would not be "in all conceivable directions." They do so appear, and for reasons already assigned, to say nothing of the fact that each conflicting location is, in theory at least, upon a distinct vein. It is because of this theory and because of the earlier practices of the land office under the act of 1866, as a recent able authority has clearly shown, that the patent recitals assume to give the number of feet of the lode conveyed; a formula which is meaningless. (Lindley on Mines, secs. 59 and 780.)

But counsel continue:

"The necessary consequence of the requirements of the statute as to the way of locating mining claims was recognized by the law-makers in providing for the settlement of adverse rights, in which a clear distinction is made between the claim as located and the surface as patented" (p. 11, first brief).

No such consequence as the one assumed was either provided for or anticipated. Conflicting rights arising from disputes as to priority of discovery, location, failure to comply with Federal and local laws, &c., are alone contemplated by section 2326. Proceedings under that statute are instituted "to determine the question of the right of possession"—that is to say, possession of the conflict or adverse claim (Iron Silver Mining Co. *vs.* Campbell, 135 U. S., 286). That it was intended to enable a trespasser to show that his trespass was essential to the required parallelism of his end lines was never before seriously asserted. However, it is said that—

"The fact that the lines of different locations cross each other does not make the lines of the junior claim any the less actual. A line itself does not have either breadth or thickness. It is but a method of designation to show the limits of underground as well as of surface rights," &c. (p. 14, first brief).

If because the lines are neither thick nor broad they may therefore be laid anywhere, there is, of course, an end to the controversy. We confess them to be "but a method of designation." Yet, as it is a statutory method and one upon which property rights are made to depend, they are and must be more than imaginary and must be laid on the public domain. Section 2322, Revised Statutes, declares that—

"The locators of all mining locations * * * situated on the public domain, * * * so long as they comply with the laws, * * * shall have the *exclusive* right of possession and enjoyment *of all the surface included within*

*the lines of their locations*, and of all veins, lodes, and ledges throughout their entire depth," &c.

How can this possession and enjoyment be exclusive if others may invade it and by such invasion initiate rights of any sort, whether against the locator or some third person? And if the locator's line of location is the boundary of his exclusive right, what prevents the lines of the junior location being as exclusive as those of the senior location? Why are not each exclusive of the other and of the world beside? The statute, of course, provides against this manifest impossibility by forbidding one locator to enter another's premises; but counsel would revise the statute by creating two or more exclusions, as the case may warrant, each in harmony with all, and all against adverse *underground* claimants; for if the "Last Chance" can invade the "New York" from one end, the "First Chance" may invade it from the other. The "Best Chance" may come in from the west and the "Only Chance" from the east. All of them may plead the same necessity, and the original locator's claim become a patchwork of triangles, hexagons, octagons, and polygons. His exclusive right would be a conclusive farce, subject to the claims or the caprice of all men.

Counsel anticipate the force of this statutory provision and therefore assure the court that their proposition "is not affected by it," because it "has never been held in practice to prevent the extending of a survey over previously appropriated territory for the purpose of defining a second location, *which second location is, of course, subject to an exclusion in favor of the first locator*," and also because in the case at bar they were actually made (pp. 14 and 15, first brief). If the second location is only subject to *an* exclusion in favor of the first one, the character and scope of it must be given before its effect can be properly determined. If it is *the* exclusion of

the statute, it is absolute; and hence it cannot "define the second location," which ceases at the point of conflict.

If the statute does not affect the appellee because its location has in fact been made, then it must follow that the way to avoid the statute is to deliberately violate it. This makes it binding only on those who wish to observe it, and protective only when and as long as it may be regarded. Equity is said to consider that as done which should have been done. Counsel would paraphrase this salutary precept by considering that to have been authorized which has been accomplished.

We are accused by counsel in their supplemental brief of misconceiving their position. It is therefore restated on page 14 of that brief as follows: "That in order to obtain that which has not already been granted, it may be necessary to lay survey lines upon territory already appropriated."

Everything in "the territory already appropriated" has "already been granted," except veins apexing elsewhere, which in their downward course enter underneath it. These may be followed thereunder when properly appropriated, and that can be done only by locating them on public domain. "That which has not already been granted" must, therefore, be that which is not within the territory at all. Hence we cannot concede any misconception on our part or see wherein counsel have at all improved their claim by its restatement. Their admission on page 21 is, on the contrary, a recognition of the soundness of our criticism and practically a surrender of the question. It is there said:

"We say that between the north end line and the south end line of the rectangular location we have everything, surface and vein, which has not been previously appropriated; and that means the entire rectangular surface *after excluding from it so much of the surface as is within the New York location, and so much of the Last Chance vein and other veins which apex within the New York location.*"

We are unable to reconcile this statement with appellee's claim. This may be due to inherent infirmity; nevertheless it appears to define with much clearness that which we have endeavored to demonstrate. It is merely an assertion that "a grant of Y is the equivalent of a grant of X + Y minus X."

Counsel have omitted all direct reference to Secretary Teller's circular appended to our brief. It is hardly in keeping with appellee's plea of necessity. At the hearing in both the lower courts Mr. Teller appeared for appellee and participated in the arguments. That circumstance may have made it awkward to attempt either comment or criticism. Now, that he seems to have withdrawn from the case, his construction of the statute while engaged in its execution, if unsound, may be discussed without embarrassment. Its conflict with appellee's insistence is obvious. The capacity and experience of its author are beyond dispute. If he, as Secretary of the Interior, committed the blunder of prohibiting citizens of the United States from defining the lines of their locations so as to secure some valuable acquisition not included within previous locations of the same ground, the fact should have been ascertained and the fault rectified. The only attempt to do so is the indirect one manifested by the insertion of an appendix to the supplemental brief, containing a letter, a circular, and two Land Office decisions. We infer that this is intended to dispose of the Teller circular without comment.

The letter is dated November 5, 1874, and is from the Commissioner to the surveyor general (p. 26, supplemental brief). It merely instructs the surveyor general that he has no jurisdiction to decide rights involved in conflicting claims; that each claimant is entitled to a survey of his entire claim, and that where two claims conflict, the plat and field-notes should show its area, extent, boundaries, and distance of intersection from established corners. No one questions this, although subsequently the practice of the surveyor general was for a

time otherwise. By section 2326 the courts, and not the land officers, must determine the question of the right of possession of these surface conflicts, and their decision is conclusive.

The circular of Commissioner McFarland is merely an elaboration of the Burdett letter. The Teller circular is addressed to "registers, receivers, and surveyors general," and specifically refers to applications "where the survey conflicts with *a prior valid lode claim or entry*, and the ground in conflict is excluded." It is subsequent to the circular of McFarland, and if its principal features have since been modified or corrected, the industry of counsel would have discovered and revealed the fact.

It will be observed that the decision in the case of the "Grand Dipper" lode bears date August 2, 1883, or more than a year previous to the publication of the Teller circular. If opposed thereto, it ceased from that time to be controlling. But it evidently refers to a survey which failed to show a subsisting conflict, and which should be noted for the instruction of the department. The "second paragraph of the circular of December 4, 1884," to which counsel calls attention on page 29, is a reference to the Teller circular itself. Just how it can benefit appellee, or why it should be so obscurely referred to, we do not understand.

The case of the Black Diamond lode is directly in our favor. This readily appears from a careful reading of the quotation in appellee's brief (p. 29):

"For the purpose of including ground held and claimed under a lode location, *which was made upon public land and valid when made*, the end line of the survey of said lode claim may be established within the boundaries of a patented placer." (22 L. D., 284.)

Known lodes are expressly excluded from the operation of a placer patent, unless applied for and entered as lodes. The Black Diamond having been "located on public land

and valid when made," the patent for the placer excluded it, and its end line was therefore on public land or a part of the valid lode claim, although physically within the boundaries of the placer. These citations cannot be construed into a support of appellee's position.

It is true that the patent recites the length of the Last Chance vein, which is commensurate with the length of the alleged claim from end line to end line; but it is not claimed to that extent as against the New York, and hence our assertion that as to the conflict it cannot be claimed at all. This, as before stated, is due to the peculiar theory that every location is presumed to have been made upon a distinct vein, and to the practice which grew up in the Land Department under the mining act of 1866. This practice and the reasons for it are well illustrated by Mr. Lindley, vol. 1, sec. 59, of his recent work on Mines, who well says (vol. 2, sec. 780) that the patent will only convey so much of the lode as has its apex within *the boundaries*, and the call for length in the patent is useless.

If this were not so the specification of length of vein would give the New York 1,500 feet thereof, for the recitals of its patent are similar to those of the Last Chance. The Flagstaff, Amy, Argentine, Stone, and other patents which by this Court have been limited to the segment of the vein actually enclosed by the patent boundaries are all similar to that in the case at bar, and hence we do not perceive the necessity of seriously considering the recitals. It is the vein or veins within the ground actually locatable that passes either by the location or the patent, or both, and this cannot be extended by implication or otherwise.

"As a mining location can only be carved out of the unappropriated public domain, it necessarily follows that a subsequent locator may not invade the surface territory of his neighbors and include within his boundaries any part of a prior valid and subsisting location."

1 Lindley on Mines, sec. 363.

"To the extent that a subsequent location includes any portion of the surface lawfully appropriated and held by another, to that extent such location is void." (*Ibid.*)

Hence the rule that a senior valid location, if abandoned, must be relocated by a junior location conflicting therewith if the latter would acquire the ground so abandoned.

Johnson *vs.* Young, 18 Col., 625.

Oscamp *vs.* Crystal River M. Co., 58 Fed., 293.

Note especially criticisms and diagram of Mr. Lindley, vol. 1, sec. 365, pp. 475–'6.

But, say counsel, the practice of the Land Department in first describing the premises included within the entire location, and then excluding those parts thereof hitherto conveyed to or covered by other locations, is intended to give to the patentee some extra-lateral underground right or rights not in conflict with those of the senior location. Hence the practice. The nature of these supposed rights will be discussed hereafter; the practice we will consider for a moment, notwithstanding the transparent fact that the unconditional character of the exception may make it unnecessary.

Mr. Lindley, vol. 1, sec. 782, calls attention to the practice, and says that it is adopted by the department *in the case of alleged cross-lodes.* Waiving the question whether, if a cross-lode right exists at all, it needs any such patent recital for its enjoyment, the facts here do not remotely suggest the idea of a cross-lode. On the contrary, the identity of the vein in the New York and Last Chance locations is freely conceded. But, says Mr. Morrison:

"Notwithstanding this apparent exception of previous entries, the system of granting overlapping patents is indefensible. A glance at the plat of any late patent in a well-developed district will introduce the subject to the reader. Three or four surveys partly crossing, partly parallel, and intersecting at all angles are frequently seen, so that unless the plat be colored the eye can scarcely distinguish one

from another. Only the rigid application of the rule of preference to prior patents can ever relieve this matter from difficulty, for while the words of a patent always except the *surface* and *claim* of previous surveys, they still proceed on the fallible supposition that each survey indicates a separate *vein.*"

Morrison's Mining Rights, 9th ed., p. 109.

The fact that the practice now criticized was, so far as it can be justified at all, founded on the "fallible supposition" of a separate or cross-vein is supported by the requirement of the department that whenever a supposititious end line is thrown within or across a previous location, proof shall be furnished that the assumed vein actually crosses such line. Without such proof the patent is withheld. We have in our original brief gone into the subject quite fully, however, and will not here repeat the argument. (See appellant's original brief, pp. 17–24.)

The fanciful distinction drawn by counsel between "patented surface" and "lines of location" could not exist if no patent had issued to the Last Chance claim. It cannot be contended since the decision in Belk *vs.* Meagher, 104 U. S., 279, that the patent is any more comprehensive than the location, so long as the owner of the latter complies with all legal requirements. This being true, it may be pertinent to consider what the attitude of the Last Chance Company would be to this litigation if its claim were still unpatented. What under such conditions would be its boundaries and its rights? Could it then claim an extra-lateral ownership of the apex of its vein based upon its end line swung across the patented New York? Could it then deny that the New York easterly side line was the limit and boundary of its claim in that direction? Could it with equal facility and plausibility indulge in refinements between "unpatented surface" and "lines of location," or would not its "rights be determined in case of his neglect to rectify his lines by reference to the intersected boundaries of the senior locator,

regardless of where the junior's monuments are placed or the course of the lines connecting them"?

1 Lindley on Mines, sec. 365.

If the New York easterly boundary which is crossed by the vein does not become the Last Chance southerly end line, from the very nature of the case and from the decisions of this Court, which declare that to be an end line which lies crosswise of the vein, then we must confess our inability to discern 'twixt rhyme and reason. If it is, there is an end to this case, for its non-parallelism with the north end line is evident, and the Court will not make a location for the appellee. It may be that since the lines converge and must, therefore, unite when extended, this Court will be inclined to follow the rule announced in Carson City Co. *vs.* North Star Company, 73 Fed. R., 597, and recognize the appellee's right to all that part of the vein lying within and above the point of the intersection of the two lines extended. More than this the appellee cannot ask, and as much as this is, we submit more than the letter of the law will justify.

Counsel, however, seek to escape from this result by announcing the proposition that "*if the apex of a vein enters across one end line thereof the locator will own as much of the vein at any depth as he owns of its apex, subject only to superior rights of other apex claimants*" (p 17, first brief).

It will be observed that this assertion completely *ignores both the direction or course of the vein and the position of the other end line.* If it is true, the vein might differ but one degree in direction from the course of the end line, or the other end line might fail by 89 degrees to parallel the one which the vein crosses. All that is necessary to the rule is the crossing of one end line by the apex of the vein. We would be unjust to the great ability of counsel if we supposed them to intend that we should take this remarkable proposition seriously. They plead in extenuation of it that "the course

which the New York side line takes across the apex is by reason of the location of the New York and not by reason of the location of the Last Chance. The east side line of the New York *which makes by reason of priority of claim* A BOUNDARY FOR THE PATENTED SURFACE *of the Last Chance* was not located by the Last Chance discoverers nor had they any voice in fixing its direction. *It is but an obstacle which interrupts what would otherwise be* their right to follow upon the apex of this vein for a further distance of six hundred feet within the lines of their claim as laid" (p. 18, first brief).

It is immaterial that this New York side line was laid by others, and that the Last Chance discoverer had no voice in fixing its direction. It is an obstacle, and therefore a boundary. It marked the dividing line between private ownership on the one side and public domain on the other. To it the Last Chance lines could go. Across or upon it they had no right, and could acquire none by any act of location. They could at the point of crossing have drawn an end line parallel with the other, or they could have made their end lines parallel to those of the New York; but they determined to contest the right of the New York to a part of its ground, and so they laid their lines in conflict with it. They were beaten, but even then they refused to rectify their lines. Can they now justify their incursions into appellant's property under the old plea of, "It was the woman who did it"? Or that when legally ejected from New York territory they nevertheless left a line there for future emergencies, and which they now have the right to conjure with?

While nothing in express terms is said in either of their briefs to that effect, counsel nevertheless seem to us to assume that this common boundary between the Last Chance and New York claims is a side line of the Last Chance, if it is anything, for in this immediate connection they proceed to a consideration of extra-lateral rights based upon a vein which crosses an end and a side line of the

claim in which it is found. In our original brief, page 33, we have endeavored to show that it cannot well be anything but an end line, and counsel have not replied as to this contention, except to say that it is a boundary of patented surface only, and therefore not controlling as to extra-lateral rights. We may, however, and for the sake of argument only, assume the easterly side line of the New York to be a portion of the westerly side line of the Last Chance. The inquiry immediately arises as to where the south end line can then be. Surely not in the New York ground, for this westerly side line joins the easterly one at a point. That point cannot be an end line, for it has not even the element of length, to say nothing of breadth and thickness. The only answer is that it is a claim with but one end line; that is, of course, parallel with itself; but it has no companion. How, then, can the vein be followed outside the Last Chance vertical boundaries? Not by the statute, for that contemplates no such condition. Not by the authorities, for Montana Co. *vs.* Clark, 42 Fed. R., 626, the only one directly in point, denies it.

We do not, however, shrink from a further consideration of the question, How far, if at all, the owner of a vein crossing a side and end line of a location may follow it? Counsel say this is an open question, "only because since the Amy-Silversmith case very vigorous efforts have been made by persons owning surface but not apex to restrict extra-lateral rights, and because the question presented by them has not been expressly decided by this court." The last reason is correct. To the other may be added the fact that owners of tops of veins have been prone to insist that courts shall cure their own mistakes and give them extra-lateral rights, whether they have complied with the law or not; and they have occasionally succeeded.

It will not be disputed that the right of a lode mine-owner to pass beyond his vertical boundaries and enter underneath his neighbor's territory in pursuit of his vein is

contrary to the common law and must be strictly construed. The burden is therefore upon him to show compliance with all the requirements of the law which confers the right.

Iron Silver Co. *vs.* Elgin Co., 118 U. S., 196.
Bluebird Co. *vs.* Murray, 9 Mont., 468.
Driscoll *vs.* Dunwoody, 7 Mont., 394.
Iron Silver Co. *vs.* Campbell, 17 Col., 267.
2 Lindley on Mines, sec. 866.

The parallel end lines, the ownership of the apex within them, the continuity of the vein, &c., must affirmatively appear. The absence of such conditions, or any of them, conclusively implies the absence of the right. It is contended that a statute requiring the vein to be within the end lines does not necessarily mean that it should "pass out" of both of them. Does it necessarily mean that it shall "pass out" of one of them in order to be "within" both of them? If a vein crosses the two side lines as laid on the surface, the portion of it inside the claim is as much "within the end lines" as though it crossed them both. It is in that case "inside the surface lines." This Court in a number of cases has defined the end lines of a claim to be those "which lie cross-wise of the general course of the vein," and they must cross it if the vein is longer than the claim, which is almost universally the case. These lines too, by the statute, must be such that, *so continued in their own direction, they will intersect the exterior parts of such veins or ledges.* This must refer to the lines which cross the vein or it is meaningless.

In their supplemental brief counsel assure the court that "the Last Chance claim was located *along* the Last Chance vein and not crosswise of it" (p. 2). Appellee's right, therefore, in the language of this Court in the Flagstaff case, is said to "extend to as much of the lode as the claim covers." In that, as in the other cases determined by this Court, the lines crossing the vein were parallel, and hence expressions

such as that last quoted. Whether a claim is in length along a vein would seem by counsel to depend on its relation to the side lines. If more nearly with them than with the end lines, it is along the claim. It was this impression which caused the trial courts to decide the Amy Silversmith case against the doctrine of the Flagstaff case. It is this error which make the Consolidated Wyoming and Carson cases palpably opposed to the Amy decision. Legally, we think, it may be said that a claim is located along a vein when the vein crosses its end lines; otherwise not. This conclusion is based upon the decisions of this Court that if the side lines of a claim as located lie across the vein they become its end lines for all extra-lateral purposes, and the angle of the crossing is immaterial. If that be so, the crossing of a side and an end line by the vein as located makes them both end lines, and the angle of the crossing is immaterial. If such angle is in either case a material fact, the right must be determined by the physical condition of each particular location, and the law becomes devoid of all certainty.

To show the necessity of a general rule such as we are now contending for, we call attention to the plat marked "A" at the end of this brief. It comprises five figures of lode claims, representing the positions of the vein in each as differing from all the others.

In figure 1, the vein crosses each side line near the northwest and southeast corners, and is practically lengthwise of the claim. Nevertheless, under the decisions, the side lines are the end lines.

In figure 3, the same vein is so located that it passes through the east end line at the extreme southeast corner of the claim and crosses the north side line as in figure 1. The physical difference between the two is scarcely perceptible, but the legal difference must be very great if the principle of the Tyler, Last Chance, and kindred cases shall control, for the owner of figure 3, by the merest accident,

may draw a new "legal" west end line near his old one and then pursue his vein on its normal dip through a segment thereof more than 1,400 feet long.

Figure 4 represents a claim located practically at right angles with the vein, whose side lines become end lines, and the 300 feet of apex covered by the claim may be followed to any depth within such lines; but figure 2 represents the same location, with the vein crossing an end and a side line and practically crosswise of the length of the claim. Here the owner, under appellee's contention, has the privilege also of drawing one new west end line, but he must place it 1,400 feet east of the one he located and confine his extra-lateral right to a space of 100 feet in width between said lines.

Figures 5 and 6 are intended to illustrate the effect of counsel's proposition upon other veins than the one located, and which may be included within the lines of the location. In figure 5 it might be said that since the claim was located across and not along the course of the vein, the locator cannot complain because he cannot follow his second vein beyond his lines. In figure 6, however, the course of the vein is parallel with the location, although the part covered by the location is not. The same end lines must define extra-lateral rights to all the veins within the claim, and it would seem, notwithstanding this, that the created end lines in each instance would deprive the owner of his right to follow any other than the vein located. It is more equitable when the vein crosses the end and the side line to confine the owner to his boundaries as a consequence of his failure to comply with the law.

The fact, then, that a claim is located along the vein or lengthwise of the vein is not controlling. The Amy claim was more nearly lengthwise than crosswise. The Stone Lode claim in the Elgin case was along the vein, and its unusual shape was entirely due to that circumstance. Indeed, the appellant there plead physical configuration as compel-

ling it to lay the claim in the form of a horseshoe. In Duggan *vs.* Davy, 4 Dakota, 110; S. C., 26 N. W., 887, the plaintiff's claim was laid along what seemed to be the outcrop or edge of the vein. It was proven, however, that this exposed top or edge was the eroded dip, and therefore no part of the course or strike of the lode. In Catron *vs.* Old, 23 Col., 433, which counsel says "is not at all parallel" with this case, the general course of the Fulton claim was along the vein. The latter made its entrance into and exit from the location across the same side line which was laid with an angle in its center. The segment of the vein actually embraced by the location was as much *within the end lines* as though it passed through them both, and fully as much so as it would be if by reason of its brief extent it began and ended within the lines of the location. Counsel apparently concede the soundness of the decision. How much stronger is the case at bar, involving a location with peculiarity of shape, disregard of statutory requirements, and dissimilarity to all those locations wherein decisions favorable to its contention have been made.

But we are asked with much confidence whether a claim inclosing a segment of a vein which crosses one end line, but which terminates before the other is reached, would not possess extra-lateral rights thereon? To this we reply that much would depend upon the circumstances of the particular case. The other end line must be parallel, certainly, or no such right would attach. Such a claim, before patent, at any rate, would be void beyond the point of termination, and if the fact were known by the Land Department no patent would issue for the excess. The lines would have to be re-formed in consequence. After the issuance of the patent the case would have to be largely governed by the facts disclosed by the testimony. Suppose, for example, that such a vein entered the claim through an end line, but at an angle of 40 degrees to the side line, or that it entered through a side line and terminated in the direction of the other or of

an end line, or that at the point of termination its course should be toward the line it had previously intersected. What rule should be invoked for the advantage of the claim-owner under such conditions? They are as pertinent to this controversy as the one supposed by counsel, although that one seems to have been encountered in the Carson City case; (73 Fed., 597), a case, however, which arose under locations made under the act of 1866, which was silent as to the position of end lines, and which practically required them to be drawn or assumed at right angles to the course of the vein, and in which case their position was deemed unimportant, because they converged on the dip, thus limiting extra-lateral rights, as they were extended on the dip from the location.

The Elgin case, of course, commands the principal share of attention, doubtless, because it is squarely opposed to counsel's proposition quoted *supra*. (*Vide p.* 17, *first brief of appellee.*) The vein there "entered the location across one end line thereof," but it was not held that "the locator owned as much of the vein at any depth as he owned of its apex." The vein, too, crossed an end and a side line *as located;* or, if you please, two end lines which were non-parallel. Both counsel for appellee and the learned judges of the 9th circuit who wrote the decisions in the Consolidated-Wyoming, the Doe-Sanger, and Tyler-Last Chance cases have misconstrued or misunderstood it, as the extracts from those decisions in the appellee's two briefs abundantly show. Thus the Court, in Doe *vs.* Sanger, say that—

"The objection there was not that the end lines of the Stone claim were out of parallel; and, as a matter of fact, what were claimed to be the end lines *were* parallel. The objection rested on the general 'form or shape' of the Stone surface location, and on the fact that the disputed ore in the Gilt Edge was not within vertical planes drawn through the end lines of the Stone claim" (*pp. 4, 5, appellee's supplemental brief*).

And the Ninth Circuit Court of Appeals, in Tyler Co. *vs.* Sweeney, 54 Fed. R., 292, makes the comment that—

"The learned justice who wrote the opinion in the Horseshoe case, when he said that the parallelism of the end lines 'is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side lines,' did not mean that it was essential to such right that such lode should extend in its length from *one end line to the other* of the location" (*p. 25, appellee's first brief*).

If this construction of the Horseshoe case is at all pertinent, it means that parallel end lines are important only when the vein is longer than the location upon it, or when it actually crosses both of them. If the vein is shorter than the location, or crosses only one end line, it is immaterial whether the other end line is parallel or not. We respectfully submit that "the learned justice who wrote the opinion" never dreamed that such a construction could be placed upon or drawn from it.

But counsel give their own interpretation to the decision. They say that it "was not in any respect based upon the relation of the apex to the side lines, but was based upon the form and shape of the surface claim and upon the fact that what the locator designated as his end lines would not if extended embrace the ore in controversy" (*p. 6, supplemental brief*).

We cannot well comprehend how a decision "based upon the form and shape of the surface claim" can ignore "the relation of the apex to the side lines." It certainly had regard to "*the relation of the apex to the end lines*" (not one end line), and determined that the two lines crossed by the apex of the vein were not parallel to each other.

It also determined that the south end line, so called, was

not an end line because not crossed by the vein, for the opinion expressly states:

"*The end lines* (of the Stone claim) *are not and cannot be made parallel. What are marked on the plat as end lines are not such. The one between numbers 5 and 6 is a side line.* The draughtsman or surveyor seems to have hit upon two parallel lines of his nine-sided figure, *and, apparently for no other reason than their parallelism, called them end lines.*" (118 U. S., 206.)

"We are therefore of opinion that *the objection that by reason of the surface form of the Stone claim* the defendant could not follow the lode existing therein in its downward course beyond the lines of the claim was well founded. Besides, *if the lines marked as end lines* on the plat of that claim *can be regarded* as the end lines of the location, no part of the Gilt Edge claim falls within vertical planes drawn through those lines extended in their own direction." (*Ibid.*, p. 207.)

In the presence of such statements we cannot justly be accused of unfairness if we insist that some of the Pacific slope decisions were written, and that counsel for appellee rest under a misapprehension of the nature and foundation of the Elgin case. This insistence may be emphasized, if need be, by a last quotation:

"Even then, with all the care possible, the end lines marked on the surface will often vary greatly from a right angle to the vein. But whatever inconvenience or hardship may thus happen, it is better that the boundary planes should be definitely determined by the lines of the surface location than that they should be subject to perpetual readjustment, according to subterranean developments made by mine workings." (*Ibid*, p. 207.)

We are, of course, aware that this Court in the Amy-Silversmith case announced that it had never decided what extraterritorial rights exist if a vein enters at an end and passes out of a side line, and that such announcement is conclusive. Nevertheless, we may suggest that the state-

ment must be founded on the circumstance that the lines actually intersected by the vein in the Stone claim and which were "crosswise of the general course of the vein" were the end lines; for if it be true that the decision went upon the circumstance that the two designated parallel end lines if extended would not embrace the Gilt Edge claim, it must follow that inasmuch as the vein did not cross the designated south end line at all, it must have crossed a side line. It extended the full length of the claim, passed out of it somewhere, and must therefore have crossed some boundary. We invoke this case as conclusive of our rights, whether it be regarded as deciding that the Iron Silver Company could not proceed upon the Stone vein beyond its boundaries because it crossed two non-parallel end lines or because it crossed one end and one side boundary or both. It certainly does not countenance the contention that where a vein crosses one end line of a location the locator may follow it to the extent of the course of the apex falling within the claim; nor can any decision, State or Federal, be found which does.

Coming now to the criticisms offered by the supplemental brief to the other decisions relied upon, and to those advanced by appellee in its own behalf, we may say frankly as to the latter, that the lower courts seem disposed to hold that extra-lateral rights do attach to veins intersected by an end and a side line where the end lines are parallel or converge. Those which arose under the act of 1872 are apposite; the others are hardly analogous. It is because of these cases, we think, that counsel want the common boundary between the Last Chance and New York claims to be considered as a side line of the former, and it must be so treated if they are to become relevant; for it is to be observed that, with the exception of Judge Hallett's opinion in the case at bar, *it has never been held that a vein crossing an end line and a so-called side line could be followed beyond its boundaries when the so-*

*called second end line was located on previously appropriated territory*, and we do not believe it ever will.

For if this second end line be so potent in determining rights to a vein which crosses its companion line at the other end, the latter certainly should possess reciprocal powers. *Suppose, therefore, that the Last Chance vein crossed its so-called south end line within the New York boundaries, and then crossed the Last Chance east side line on the latter's undisputed territory.* Could not counsel with equal force contend that the vein crossed one end line of the location, and therefore "the locator would own as much of the vein at any depth as he owned of its apex," &c.; ? and would not their citations be equally conclusive ?

It will be remembered that Judge Hallett said at the original hearing that he could "easily conceive of a piece of ground being in a situation on account of other locations adjacent to it which would call for pretty nearly all the lines, both end lines and side lines, being upon other claims;" and such a location would be just as effective as to the territory actually acquired as though the lines were not private property. Such conditions would require the legal creation of two end lines in order to perfect the claim or all our notions of topography are misleading. This, it is decided, cannot be done.

Counsel call attention to the remarks of Justice Miller, at *nisi prius*, in the case of Stevens *vs.* Williams (*pp. 9, 10, supplemental brief*). In that case the defendant contended that from the underground developments on the vein in controversy it appeared that the Iron Mine location of the plaintiff was not at right angles to the dip, but at one of about 45 degrees thereto; hence it was contended that the right to follow it did not belong to the plaintiff. This involved the position of the strike to the end lines, and Justice Miller's remarks have reference to the general course of the vein north and south, which was its strike, and its course or beginning and ending on the east and west, which was its

dip. It certainly is not the law since the Amy-Silversmith decision that "if a locator happens to strike out diagonally, so far as his side lines include the apex, so far can he pursue it laterally," for in that event the particular lines crossed by the apex would become unimportant. All the other cases cited by counsel in their last brief have been heretofore commented on, and we will not indulge in unnecessary repetition.

III.

The third proposition for which counsel contend, and which they support with both argument and illustration, is that "where several overlapping claims are located along the apex of the vein, the senior claimant holds as much of the vein at any depth as he holds of the apex within his location. The next in rank holds as much of the vein at any depth as there is of its apex within his location, except as to the portion thereof owned by the first in rank, and so on with subsequent claimants" (*p. 28, appellee's first brief*).

Counsel think "this proposition to be a necessary outgrowth of the preceding discussion." Perhaps it is; for if a man is once recognized to have a right to go upon his neighbor's private mining property and relocate it in whole or in part, it is extremely difficult to place any limitation upon the consequences. If 1,500 feet of the apex of a vein is subject to half a dozen locations, there is no reason why it may not become a center for the radiation of extra-lateral rights in every conceivable direction. Like the north pole, all lines leading from it must be to the south, although they may run in opposite directions; and such a rule would no doubt prove an universal solvent of mining difficulties, for, as counsel declare, "it would certainly meet every possible condition that may arise in the conflict of ownership in mining claims as to extra-lateral rights on the dip of the same vein" (*p. 28, first brief*).

If the location of the Last Chance claim, "the next in rank," holds as much of the vein at any depth as there is of its apex within the Last Chance location except as to the portion thereof owned by the New York, "the first in rank," it must follow that the appellee owns 1,500 feet of the vein at any depth except in so far as the senior claim of the New York location to a part of this 1,500 feet may diminish such ownership. That diminution in turn depends entirely upon the extent of the overlap of the two claims and the relative position of their end lines; for the point at which they intersect and pass through each other is the point or place at which the intercepted Last Chance ownership recommences. This process of beginning, interruption, and reassertion is described with charming *naiveté* by counsel at pages 29 to 32, inclusive, and we are informed that it is for this reason that "the method of conveyance adopted by the Land Department" exists, that being "the only method by which it can be accomplished." Thus it is said the Last Chance patent describes first the entire rectangular tract marked "survey lot 7263 A," after which it expressly excepts that portion of the *ground* (the italics are theirs) embraced in survey No. 7406, the New York claim, and excepts also that portion of the Last Chance vein and of other lodes and ledges throughout their entire depth, *the tops or apexes* of which lie *inside of the excluded ground* (p. 33). Just how these veins and portions of veins throughout their entire depth can be excluded and still remain the property of appellee in anywise, whether in whole or in part, we are not informed except by the reservation of two "howevers" in as many sentences. "We have already shown, *however*, that for instance on figure B the portion of the vein in controversy which apexes within the New York is marked by the letters *j j, k k*. *Therefore*, it is only the part represented by that figure which is excepted from the section of the lode granted to the Last Chance" (p. 33). Therefore, it must

also follow that the extent of the vein given to the Last Chance increases in width as it descends into the earth!

"The grant, *however*, proceeds near the top of page 6 of the Record as follows: 'Said lot No. 7263 A (Last Chance location), extending 1,278.34 feet in length along said Last Chance vein or lode, *the granted premises in said lot* containing five acres and twenty-five hundredths of an acre, more or less.' So we have here a distinction between the *survey lot* and the '*granted* premises,' the latter referring to the surface acreage, while the lode which is conveyed is described as extending the full length of the rectangular location, excepting that part apexing within the excluded surface" (p. 33, 34). The learned counsel, however fallacious, are generally very clear. Just how this statement becomes applicable to their contention is not apparent. The confusion increases when our references to Mr. Washburn are admitted and followed by the query as to what is left to the Del Monte (p. 35).

The Del Monte is entitled to everything within its vertical boundaries save lodes apexing outside of them and which have been so appropriated by others as to give them a right of entry.

Mining Company *vs.* Cheesman, 116 U. S., 533.
Iron Co. *vs.* Elgin Co., 118 U. S., 196.
Leadville M. Co. *vs.* Fitzgerald, 4 Morrison M. R., 380.
Cheesman *vs.* Shreve, 37 Fed. R., 36.
Catron *vs.* Old, 23 Col., 433.
Doe *vs.* Waterloo M. Co., 54 Fed. R., 935.
Jones *vs.* Prospect Mt. T. Co., 21 Nev., 339.

The question is not what the Del Monte claim possesses, but what right within its lines the appellee may have. This query of counsel suggests the suspicion that they are endeavoring to try two cases here; for they are counsel for the New York as well as for the Last Chance. In the controversy between the Del Monte Company and the

New York Company, the latter claimed the right to pursue the vein between its south end line and a so-called compromise line parallel with the Last Chance end line, and drawn at the point where the vein passes from the New York into the Last Chance territory. (See 66 Fed. R., 212.) These two lines diverge as they are extended westerly, thereby leaving a constantly widening space through Del Monte territory. They were not permitted to do this, but if counsel can impress this Court with the soundness of their present views, the Last Chance may take what the New York has thus far failed to secure. The decision in the New York case is quoted by counsel (p. 21) in support of its side and end line contention. We may remind the Court that it is an unqualified denial of their claim to take everything below the intersecting priority of the New York.

Indeed, every case on the subject limits extra-lateral rights on the dip to the line traversed by a superior or senior extra-lateral right. Beyond such line it has absolutely no existence. In addition to the case just quoted we refer to Tyler Mining Co. *vs.* Sweeney, 79 Fed., 277; Last Chance Co. *vs.* Tyler Co., 79 Fed. In Tyler Co. *vs.* Sweeney, 54 Fed., 284, Judge Hawley said:

"In cases of controversy where the right exists under each valid location to follow the lode in its downward course, it necessarily follows that both locations cannot rightfully occupy the same space of ground, and in all cases where a controversy of this kind arises the prior locator must prevail, precisely as in cases of like controversy between locations overlapping each other lengthwise on the course of the lode."

This doctrine is practically assumed by Mr. Justice Brewer, speaking for the Court, in Last Chance Co. *vs.* Tyler Co., 157 U. S., 687. (See 2 Lindley on Mines, sec. 609.)

If the appellee has the right, as shown by its diagrams (*Figs.* 1, 2, 3, *and* 4, *first brief*) and the argument of its counsel, to as many feet on the dip of its vein as it has of the

apex in its location calculated from end line to end line on the surface, after other prior rights are satisfied, it is because such right is given by the statute. It therefore is of universal application, and as self-evident in a case like figure 4 as in any other. In such a case, however, the Last Chance would have no right of way either through the 1,500 feet of New York vein on the dip or the 150 feet of Del Monte vein on the dip. Yet it must have both or its ownership is worthless. It cannot condemn the right, for it is a private corporation and the use is a private one. It has no such right at common law. It has no such right under the statute, for that gives one only to the junior owner of one of two veins intersecting each other on their dip. It cannot go upon the surface of the ground above the place where its ownership reasserts itself and sink down to or upon it, for the statute forbids an entry upon the surface of another claim for any such purpose.

It will be observed also that appellee's claim disregards the rights of junior locators on the extension of the vein beyond the point where the two or more claims overlap each other on its apex. For since the end lines of a claim, although required to be parallel, need not be at right angles to the vein, but may take any direction (1 Lindley, 365), and since appellee's contention, to be at all practical, must relate to overlapping claims on the same vein with end lines differing on each claim from the others, it follows that three or four such locations could be so made over a surface for the most part common to all of them; that extra-lateral rights might be acquired both ways beyond such surface, notwithstanding the rights of other junior locations upon the extensions of the vein.

To illustrate this we beg to refer to the plat marked "B" and appended to this brief. It represents a vein running east and west on which have been located six claims. Nos. 1 and 2 were located first, Nos. 2 and 3 next, and Nos. 5 and 6 are junior to all. Nos. 1 and 2 are 300 feet apart

with end lines due north and south. Their owner, however, in obedience to appellee's contention, has located two additional claims on the 300 feet of space between the older ones by extending the end lines of No. 3 southwesterly and those of No. 4 southeasterly across the apex of the vein. He has also made each of them 1,500 feet long by running the north side lines within and the south side lines just without the older locations. The westerly end line of No. 3 and the easterly end line of No. 4 are entirely within the boundaries of Nos. 1 and 2 respectively, and the southwest corner of Nos. 1 and 3 and the southeast corner of Nos. 2 and 4 are identical. Claims 3 and 4 are patented, with the same exceptions appearing in the patent of the Last Chance. Under counsel's assertion, Nos. 1 and 2 take all of the vein to any depth within their end lines as extended on the plat. Nos. 3 and 4, "the next in rank," take all of the vein within their end lines extended to any depth, "except as to the portion thereof owned by Nos. 1 and 2," and this "meets every possible condition that may arise in the conflict of ownership in mining claims as to extra-lateral rights on the dip of the same vein."

But after the making of these locations, which reach down with the arms of Briareus, encompassing everything within the widening scope of their rapidly diverging lines, another citizen of the United States goes upon the unoccupied public domain immediately to the east of No. 2, and immediately to the west of No. 1, and there he locates claims Nos. 5 and 6, respectively, on the apex of the same vein and in conflict on the surface with no one. Under the law these last locations represent to their owner the exclusive right of possession of all the surface included within them and of the vein thoughout its entire depth and within the end lines extended in their own direction; but under the new dispensation *two other claims located over and upon previously appropriated premises* assert extra-lateral rights on the very threshold of these, and continue the encroachments across

their pathway until their rights are destroyed utterly. Even then the work of destruction continues, for still other east and west locations may have been lawfully made on the course of the vein and their extra-lateral rights in turn are cut off by this new system of subterranean piracy. It is, indeed, calculated to "meet every possible condition that may arise in the conflict of ownership as to extra-lateral rights," and gathers them in even as a hen gathers her brood underneath her wing. If we were selfish enough to exalt our own above our client's interests, we would fervently hope for the establishment of counsel's proposition. The vista of mining controversy and entanglement it opens to the view is practically limitless; and in its near perspective we might easily discern that part of the glittering crest of prosperity's returning wave which is designed for the benefit of mining attorneys only. With Spartan fortitude we nevertheless deny that it is the law, and we feel quite sure the Court will be of the same opinion.

Our friends, in closing, refer to the conditions of the Del Monte patent, and insist that by its very terms appellant "took its title subject to the right of the owners of the Last Chance vein to follow that vein upon its dip under the surface of the Del Monte and to extract and remove the ore therefrom" (*p.* 25, *supplemental brief*).

The conditions of the patent to the Del Monte are conceded. They are the same which are inserted in all patents for lode claims. They conserve the right of the Last Chance owners to go underneath the Del Monte only when they have shown compliance with all the requirements of the law. Being the owner of the surface, it is presumed that appellant is the owner of everything underneath it.

Mining Co. *vs.* Campbell, 17 Col., 267.

Cheesman *vs.* Shreve, 37 Fed., 36.

Cheesman *vs.* Hart, 42 Fed., 98.

Leadville Co. *vs.* Fitzgerald, 4 Morrison, 380.

In the language of Judge Hawley, we may say, " Hands off of any and everything within my surface lines extending downward vertically until you prove you are working upon and following a vein which has its apex within your surface claim," and, we may add, so located with reference to your lines that you may follow it underneath ours.

The claim by appellee of anything except " the ores situated in the Last Chance vein and lying between the two vertical planes, one drawn through the north end line of the Last Chance and the other through the north compromise line," to which appellee, after all its speculation, finally returns (page 25, last brief), is the only one it presented to the trial court. It is the only one which under its answer we think it has the right to make, and it is surely the only one which the trial court pretended to recognize. It has failed to establish that one by its appeal to end lines within another location, to the theory that the New York side line is its side line as well, to the plea that one end-line crossing is sufficient, or to the suggestion that, although courts cannot make two new lines for a locator, nevertheless they should make one. We therefore, in conclusion, assert that the answer to the queries of the court of appeals should be:

1. The lines of a junior lode location cannot be laid upon, within, or across a *valid* senior location for any purpose.

2. The patent of the Last Chance Lode mining claim, which first describes the rectangular claim by metes and bounds and then excepts and excludes therefrom the premises previously granted to the New York Lode mining claim, convey to the patentee nothing more than he would take by a grant specifically describing only the two irregular tracts which constitute the granted surface of the Last Chance claim.

3. The easterly side line of the New York Lode mining claim is an end line of the Last Chance Lode mining claim within the meaning of sections 2320 and 2322 of the Revised Statutes of the United States.

4. If the apex of a vein crosses one end line and one side line of a lode mining claim located thereon, the locator has no extra-lateral rights on said vein. This is especially applicable to the Last Chance claim if the easterly side line of the New York is to be considered a side line of the Last Chance as well, for the latter in that case can have but one end line and the required parallelism becomes impossible.

5. On the facts presented by the record herein the appellee has no right to follow its vein downward beyond its west side line and under the surface of appellant's premises.

We sincerely apologize for trespassing so long on the patience of the Court, but the importance and novelty of the problems involved have made brevity impossible.

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FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

No. 147.

Appx. to Br. of Thomas W. Bickett for Appt.



IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Dec. 16, 1897.

*No. 147.*

THE DEL MONTE MINING AND MILLING COMPANY, APPELLANT,

*vs.*

THE LAST CHANCE MINING AND MILLING COMPANY.

## OPINION OF JUDGE HALLETT IN CASE OF STRATTON vs. GOLD SOVEREIGN MINING AND TUNNEL COMPANY ET AL.

UNITED STATES OF AMERICA, *District of Colorado*, } ss:

IN THE CIRCUIT COURT.

W. S. STRATTON
*vs.*
THE GOLD SOVEREIGN MINING AND TUNNEL COMPANY, *a Corporation, et al.* } No. 3662.

ON MOTION FOR INJUNCTION.

*Opinion by Hallett, J. (Orally).*

This is a bill to restrain the respondents from driving a tunnel through a mining location in Cripple Creek district, owned by complainant, and called "John A. Logan."

Respondents are proceeding under a tunnel location made March 30, 1892, under the laws of the State of Colorado, section 2323, Revised Statutes of the United States. Complainant's location was made September 5, 1891, and is therefore of earlier date than the tunnel location. April 13, 1895, a patent was issued for the claim, and thus all questions affecting the validity of the location were put at rest.

Respondents have answered the bill, saying that they claim the right "to the possession of all veins, lodes, or ledges within three thousand feet from the face of said tunnel on the line thereof not previously known to exist, discovered in such tunnel to the same extent as if discovered on the surface, as guaranteed to them, as under and by virtue of section 2323 of the Revised Statutes of the United States."

In another part of the answer the following averment occurs:

"They admit that they will, unless prevented by the orders of this honorable court, continue the prosecution of work upon said tunnel for the purpose of claiming 1,500 feet in length upon all lodes, veins, or ledges discovered therein not appearing at the surface and which have not been discovered prior to the location thereof."

Thus it appears that the tunnel is being driven by respondents for the purpose of discovering lodes in the line thereof, and that they intend to assert title to such as may be discovered in the tunnel under the act of Congress within complainant's location and elsewhere. Whether this may be done as against a valid location on the surface of earlier date than the tunnel location is the question at issue between the parties.

Chapter 6, title XXXII, of the Revised Statutes of the United States relates to the mineral lands of the public do-

main of the United States. Section 2319 of that chapter is as follows:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

Section 2320 provides for the location of lode claims and the extent and character of such claims.

Section 2322 provides that the locators of claims pursuant to section 2320 shall have the exclusive right of possession and enjoyment of the surface and of all veins throughout their entire depth, the tops or apexes of which lie inside their surface lines, which includes all ore within the claim excepting such as may outcrop in adjacent territory and pass with other locations. When properly made, according to law, a location is segregated from the public domain and becomes the private property of the locator.

Noyes *vs.* Mantle, 127 U. S., 348.

During the lawful occupancy and enjoyment of the locator, or when he shall obtain from the Government a patent, nothing can be done within the claim which shall be or become the basis of another location.

Gwillim *vs.* Donnellan.

Chapter 6 of the Revised Statutes provides for three kinds of locations on the public mineral lands, which, in common speech, are called "lode locations," "tunnel locations," and

"placer locations." When a location has been properly made in either class, and so long as it shall be fully maintained by use and enjoyment or by patent, the territory embraced in such location is not subject to adverse location by a claimant of the same class or any other class. The reason is that the territory covered by such location has been severed from the public domain and has become private property, which is no longer open to a new appropriation. If the locator shall fail to maintain his claim in the manner prescribed, the territory covered by it will revert to the public domain and again be subject to location by the same or a new claimant. Assuming the John R. Logan location to have been well made in the month of September, 1891, and maintained thereafter, the grantors of respondents could not afterwards locate the same territory by a tunnel or in any other way.

The parties to this suit have each assailed the other location with a view to gain precedence, as not having been made in the time and manner set out in the certificates of record under which they respectively claim title. In the practice of the Court such matters are usually reserved for a better consideration at the final hearing.

In the decision of the present motion for the preliminary injunction we accept the date given by complainant to the Logan location in September, 1891, and also respondents' earliest date for the tunnel location in March of the following year.

In the answer to the bill respondents declare that the discovery and location of veins on the line of the tunnel is not the only purpose for which the tunnel is to be made; the corporation respondent owns claims adjacent to the Logan location which it desires to penetrate and develop by means of the tunnel. It is also expected that veins will be cut on the further side of the Logan location, which respondents will be able to acquire, if permitted to drive the tunnel

through and beyond the territory of the latter. The questions which are thus suggested relate to a right of way through property owned by the corporation respondent, and for making discoveries in the public domain elsewhere outside the limits of the Logan location. So understood, the questions are not germane to the principal issue in the case, but are inconsistent with it. So long as respondents assert the right to take the ores of the Logan location through and by means of their tunnel they cannot be heard to say that they have not such intention, but their purpose is to go beyond in search of greener fields and pastures new.

Another proposition is earnestly advocated by respondents: That the case is not of equitable cognizance, inasmuch as nothing of value has been found in the tunnel within the limits of the Logan location. Counsel is correct in saying the Court will not enjoin a trespass on a mining claim unless it appears that the value of the complainant's estate is menaced. That rule has been often recognized in this jurisdiction, when the alleged trespasser had departed from his own claim in pursuit of a vein of which he held the outcrop. In such cases the Court has said: Peradventure the trespasser will find nothing and we shall escape from the vain contentions of these people. The injured party may properly be left to his action at law for such damages as may have resulted to him from blasting a hole in the solid granite of the mountain.

The case at bar is different. Complainant alleges that he has discovered good ore in his Logan location, and that respondents intend to assert title to it whenever they can reach it through and by means of their tunnel.

In any view that may be taken of the controversy an action at law would not afford adequate protection to complainant's interest in the claim.

The Rico-Aspen case, reported in 167 U. S., was the sub-

ject of much comment at the bar, but it does not appear to have any bearing upon any question presented in the record.

The motion for a preliminary injunction will be allowed, and the order will stand until otherwise directed.

Rendered December 6, 1897, 10 a. m.

[Endorsed:] Case No. 16,237. Supreme Court U. S., October term, 1897. Term No., 147. The Delmonte Mining & Milling Co., app't, *vs.* The Last Chance Mining & Milling Co. Opinion of U. S. circuit court for district of Colorado in case Stratton *vs.* The Gold Sovereign Mining & Tunnel Co. *et al.* Filed Dec. 16, 1897.